

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMON DEAN TINSLEY,

Defendant-Appellee.

UNPUBLISHED

October 16, 2003

No. 240160

Livingston Circuit Court

LC No. 01-012209-FC

Before: Donofrio, P.J., and Sawyer and O’Connell, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction for two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a). We affirm.

In 1993, defendant and the victim’s mother moved into a house with their young son and the victim. From the time the victim was ten years old to when she turned twelve years old, defendant regularly called her up to his bedroom and rubbed her stomach and back. The physical contact routinely culminated in defendant rubbing the victim on her buttocks and inside her labia. The victim feared violent retaliation if she told her mother, and the sexual contact subsided as the victim aged, so the victim did not disclose defendant’s actions until she saw that her new half-sister could become a victim too.

Defendant first argues that the trial court erred when it allowed the prosecutor to introduce other-acts evidence regarding identical contemporaneous episodes of sexual contact with the victim and defendant’s propensity for violence. We disagree. Because defendant failed to object to the introduction of this evidence, he forfeited this issue. *People v Carines*, 460 Mich 750, 761; 597 NW2d 130 (1999). Therefore, we will only review the issue if defendant demonstrates plain error that affected his substantial rights. *Id.* at 763-764. Defendant’s claim of error regarding contemporaneous sexual contacts does not merit our review, because the evidence fits squarely within MRE 404(b)(1)’s “scheme, plan, or system” exception. See *People v Sabin (After Remand)*, 463 Mich 43, 63-65; 614 NW 2d 888 (2000). Also, the evidence regarding defendant’s hostility explained the victim’s prolonged silence, which defendant used to attack her credibility. Therefore, MRE 402 permitted the prosecutor’s use of the relevant evidence, and the trial court did not commit plain error by allowing the jury to consider it. Further, defendant also presented his own potent evidence of his violent behavior to further his strategic suggestion that the victim concocted the sexual-contact allegations to free herself from

defendant's strict supervision. Therefore, the prosecutor's presentation of similar evidence did not adversely affect defendant's substantial rights.

Next, defendant argues that the prosecutor deprived him of a fair trial by making improper comments to the jury. We disagree. Defendant failed to object to any of the statements he now cites as improper. A defendant's failure to timely and specifically object to improper prosecutorial comments forfeits the issue's review unless an objection and cautioning instruction could not have cured the subsequent prejudice or our failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Our resolution of defendant's first issue forecloses any finding that the prosecutor committed misconduct when it presented and argued other-acts evidence. We also disagree with defendant's arguments that the prosecutor denied him of a fair trial by improperly vouching for the victim, disparaging defendant, and appealing to the jury's civic duty. A prosecutor need not argue the least prejudicial evidence or state inferences in the blandest terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). In context, the vouching comments defendant cites refer directly to relevant evidence and do not invoke reliance on the prosecutor's status, personal opinion, or knowledge of verifying facts withheld from the jury, so no impermissible vouching occurred. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Likewise, the prosecutor's arguments regarding defendant's overbearing demeanor referred directly to presented evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Finally, the prosecutor's brief comment urging the jury to "do justice" followed a lengthy summary of the evidence and the prosecutor's repeated request that the jury closely examine the evidence, so the prosecutor likely dissipated any unfair prejudice the comment created. *People v Bass (On Rehearing)*, 223 Mich App 241, 251; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866 (1998). Because defendant failed to demonstrate a miscarriage of justice or incurable prejudice, the prosecutor's comments do not require review. *People v Messenger*, 221 Mich App 171, 177; 561 NW2d 463 (1997).

Finally, defendant argues that the trial court disproportionately sentenced him to 25 to 60 years in prison. We disagree. In this case, the judicial sentencing guidelines apply because the offenses occurred before January 1, 1999. *People v Reynolds*, 240 Mich App 250, 254; 611 NW2d 316 (2000). Here, defendant's sentence falls within the guidelines, so it is presumed proportionate. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). Defendant's age and lack of criminal history fall short of sufficient "unusual circumstances" to overcome the presumption of proportionality. See *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). On the other hand, the trial court could properly consider evidence that defendant molested the victim weekly over a period of four years and used actual and threatened domestic violence to hide and perpetuate his conduct. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). In light of this evidence, defendant fails to demonstrate that his sentence was disproportionate. *Kennebrew*, *supra* 607-608.

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Peter D. O'Connell